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9
10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 IN RE FACEBOOK BIOMETRIC
14 INFORMATION PRIVACY LITIGATION

15 THIS DOCUMENT RELATES TO:
16 ALL ACTIONS

**FACEBOOK, INC.'S OPPOSITION TO
PLAINTIFFS' MOTION TO EXCLUDE
THE TESTIMONY OF DEFENDANT'S
PROPOSED EXPERT MATTHEW
TURK, PH.D**

Master Docket No.: 3:15-CV-03747-JD

Date: May 3, 2018
Time: 10:00 a.m.
Location: Courtroom 11

Hon. James Donato

*[Declaration of John Nadolenco filed
concurrently herewith]*

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24 **REDACTED VERSION SOUGHT TO BE**
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3 858 F.3d 1227 (9th Cir. 2017)..... 6

4
5 **Other Authorities**

6 Fed. R. Civ. P. 26 6, 11

7 Fed. R. Evid. 702 6

INTRODUCTION

Facebook’s expert Dr. Matthew Turk is the Chair and Professor of the Computer Science Department at the University of California, Santa Barbara, and one of the most renowned researchers in the field of facial recognition. Dr. Turk intends to testify that: [REDACTED]

[REDACTED] Dr. Turk also intends to rebut the testimony of plaintiffs’ expert Dr. Atif Hashmi.

In a bid to avoid having their proposed experts—[REDACTED]
[REDACTED]
[REDACTED]—go up against Dr. Turk, plaintiffs seek to exclude the entirety of Dr. Turk’s testimony under Federal Rule of Evidence 702 and Federal Rule of Civil Procedure 26. Plaintiffs claim that Dr. Turk’s initial opinions are limited to [REDACTED]
[REDACTED]; that he did not consider sufficient evidence in reaching those opinions; that he did not disclose the bases of his opinions or support his opinions with analysis; and that he opines on matters that are irrelevant and outside of his expertise.¹ Even a cursory review of Dr. Turk’s report reveals that none of these characterizations is remotely accurate. Dr. Turk’s report concerns a key issue in this litigation: Whether Facebook’s facial-recognition technology obtains “scans of face geometry” under BIPA. [REDACTED]
[REDACTED]

[REDACTED] It rests on several other *wholly independent* grounds, including Dr. Turk’s conclusions that [REDACTED]
[REDACTED]

¹ Plaintiffs do not even address Dr. Turk’s rebuttal testimony, much less provide a basis for excluding it.

1 [REDACTED]. As his report clearly discloses, these opinions and
2 conclusions are based on [REDACTED]

3 [REDACTED]
4 [REDACTED]
5 [REDACTED] All of this is well within Dr. Turk's expertise.

6 Dr. Turk's report and opinions are more than sufficient to satisfy the threshold
7 admissibility requirements of Rule 702 and Rule 26. Plaintiffs' motion should be denied.

8 BACKGROUND

9 A. Facebook's Expert Disclosure

10 On December 22, 2017, Facebook disclosed Dr. Matthew Turk as an expert and
11 submitted a report containing his opinions and bases for them. [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 In his report, Dr. Turk provides an overview of facial-recognition and machine-
19 learning concepts and approaches. He then analyzes Facebook's facial-recognition
20 technology. Finally, he sets forth the opinions he formed based on that analysis. [REDACTED]

21 [REDACTED] 22 [REDACTED] 23 [REDACTED] 24 [REDACTED] 25 [REDACTED] 26 1. Background On Facial Recognition And Machine Learning

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[REDACTED]

2. Analysis Of Facebook’s Facial-Recognition Technology

Dr. Turk then analyzes how Facebook’s facial-recognition technology works. [REDACTED]

[REDACTED]

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3. Conclusions And Opinions

Based on his analysis, Dr. Turk concludes that

B. Facebook’s Rebuttal Expert Disclosure

On February 2, 2018, Dr. Turk submitted a rebuttal report in response to plaintiffs' initial expert disclosure of Dr. Atif Hashmi. *See Turk Rebuttal Rpt. (Ex. 2)*. Dr. Hashmi opined that [REDACTED]

Dr. Turk's

rebuttal report refutes this opinion, explaining that

1 [REDACTED]
 2 [REDACTED]. Turk Rebuttal Rpt. ¶¶ 25-57. Dr. Turk also
 3 refutes Dr. Hashmi's opinion that [REDACTED]

4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED].
 10 Plaintiffs do not challenge Dr. Turk's rebuttal report in their motion.

11 ARGUMENT

12 Under Federal Rule of Evidence 702, expert testimony is admissible if the expert is
 13 qualified and the testimony is "relevant and reliable." *Wendell v. GlaxoSmith Kline LLC*,
 14 858 F.3d 1227, 1232 (9th Cir. 2017); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509
 15 U.S. 579, 589 (1993) ("*Daubert I*"). Federal Rule of Civil Procedure 26 also requires a
 16 retained expert to submit a report containing, among other things, "a complete statement of
 17 all opinions the witness will express and the basis and reasons for them" and "the facts or
 18 data considered by the witness in forming them." Fed. R. Civ. P. 26(a)(2)(B).

19 There is no basis for excluding Dr. Turk's anticipated testimony as disclosed in his
 20 initial expert report. That testimony goes to several of the key issues in this litigation and
 21 is based on Dr. Turk's independent analysis of [REDACTED]
 22 [REDACTED]
 23 [REDACTED]—all of
 24 which were adequately disclosed in his report. Plaintiffs' claims to the contrary are based
 25 on gross mischaracterizations of Dr. Turk's report and the relevant law.²

26 ² At a bare minimum, Dr. Turk may testify as a rebuttal expert if plaintiffs' expert,
 27 Dr. Hashmi, testifies because plaintiffs do not raise *any* challenge to Dr. Turk's anticipated
 28 rebuttal testimony. *But see* Dkt. 303 (explaining why Dr. Hashmi's testimony should be
 excluded).

I. DR. TURK'S OPINION THAT [REDACTED] IS RELEVANT AND BASED ON FULLY DISCLOSED, RELIABLE METHODS AND ANALYSES.

A. Dr. Turk's Testimony Bears On One Of The Key Issues In These Cases.

Plaintiffs argue that Dr. Turk's entire proposed testimony is irrelevant because his

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. That argument is premised on a blatant

misrepresentation of Dr. Turk's opinions and on a misunderstanding of the relevant issues.

Dr. Turk's opinion that [REDACTED]

[REDACTED]
[REDACTED] Plaintiffs rely on two selectively-quoted excerpts out of Dr. Turk's 47-page report to suggest otherwise; but those excerpts belie their argument.

Plaintiffs assert that Dr. Turk opined that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Plaintiffs' attempted sleight of hand is even more obvious when the cited sentences of Dr. Turk's report are read in full:

Plaintiff's Motion	Dr. Turk's Report
[REDACTED]	[REDACTED]

1	[REDACTED]	[REDACTED]
2	[REDACTED]	[REDACTED]
3	[REDACTED]	[REDACTED]
4	[REDACTED]	[REDACTED]
5	[REDACTED]	[REDACTED]
6	[REDACTED]	[REDACTED]
7	[REDACTED]	[REDACTED]
8	[REDACTED]	[REDACTED]
9	[REDACTED]	[REDACTED]
10	[REDACTED]	[REDACTED]
11	[REDACTED]	[REDACTED]

12 This is confirmed by the rest of Dr. Turk's report, which plaintiffs ignore. Dr. Turk
13 spends fifteen pages explaining how Facebook's facial-recognition technology works; only
14 a single line [REDACTED]. *See Turk Rpt.* at 24-38. And although he then spends
15 half a page explaining his conclusion that [REDACTED]
16 the next five pages are devoted to his conclusions that [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED] *See id.* at 39-43. The
21 overwhelming majority of Dr. Turk's findings and conclusions have *nothing to do with in-*
22 [REDACTED], and plaintiffs do not even attempt to argue that these opinions are irrelevant.
23 Thus, even if the testimony about [REDACTED] were not admissible, that certainly would
24 not justify excluding the entirety of Dr. Turk's testimony.

25 But in any event, the portion of Dr. Turk's report concluding that [REDACTED]
26 [REDACTED]
27 *is* relevant and admissible. Although at the pleading stage this Court did not accept
28

1 Facebook’s argument that “scan” in BIPA is limited to an in-person scan based on the
2 structure of the statute, it recognized that “[a]s the facts develop, it may be that ‘scan’ and
3 ‘photograph’ with respect to Facebook’s practices take on technological dimensions that
4 might affect the BIPA claims.” Dkt. 120 at 22. [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED] This testimony
10 bears directly on the issues that this Court has recognized are relevant to these cases.

11 **B. Dr. Turk’s Opinions Rest On Reliable Methods.**

12 Plaintiffs next claim that Dr. Turk’s testimony should be excluded as unreliable
13 under Rule 702 because Dr. Turk allegedly “ignored” certain evidence—specifically, a
14 paper authored by Mr. Taigman and other Facebook employees (the *DeepFace* paper) and
15 [REDACTED]

16 [REDACTED] Mot. at 6-7. These arguments are both factually and legally meritless.

17 As a threshold matter, plaintiffs’ claim that Dr. Turk “ignores” the *DeepFace* paper
18 is demonstrably false. [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 More fundamentally, plaintiffs’ complaint that Dr. Turk did not address alleged
22 inconsistencies between his opinions and other materials in the record is not a basis for
23 excluding his testimony. Rule 702’s reliability requirement tests the *admissibility*, not the
24 weight or credibility, of an expert’s opinion: The test “‘is not the correctness of the
25 expert’s conclusions but the soundness of his methodology.’” *Primiano v. Cook*, 598 F.3d
26 558, 564–65 (9th Cir. 2010) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311,
27 1318 (9th Cir. 1995)). Thus, any challenge “must be [focused] solely on principles and
28 methodology, not on the conclusions they generate.” *Daubert I*, 509 U.S. at 595.

1 Plaintiffs' argument is nothing more than a challenge to the *correctness* of Dr. Turk's
 2 opinions: they contend that he should have reached a different conclusion based on
 3 allegedly "contrary evidence." And their attempt to conceal this shortcoming by framing
 4 their challenge as going merely to Dr. Turk's *consideration* of evidence is fruitless.
 5 Arguments about the "scope" of evidence considered or that an expert "failed to
 6 thoroughly analyze the data gathered . . . go to the weight of the . . . evidence and not its
 7 admissibility." *Meeker v. Meeker*, 2004 WL 2457793, at *11 (N.D. Cal. July 6, 2004).
 8 These objections should be aired through "vigorous cross-examination, presentation of
 9 contrary evidence, and requests for limiting instructions"—not by excluding the expert's
 10 testimony. *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1265 (N.D. Cal. 1997).

11 Plaintiffs' reliance on *In re Rezulin Products Liability Litigation*, 369 F. Supp. 2d
 12 398 (S.D.N.Y. 2005), is misplaced. *Rezulin* explained that when an expert's opinion is
 13 based solely on a review of scientific research, "a factor" to consider in the *Daubert*
 14 analysis is whether "the *relevant scientific literature* contains evidence tending to refute the
 15 expert's theory and the expert does not acknowledge or account for that evidence." *Id.* at
 16 408-10, 425 (emphasis added). As discussed above, Dr. Turk's opinion is not based solely
 17 on a review of scientific research; *Rezulin* is inapposite on that basis alone. And in any
 18 event, plaintiffs do not identify any *scientific literature* that Dr. Turk *failed to consider*.
 19 He *did* consider the *DeepFace* paper. The other documents cited by plaintiffs are not
 20 scientific literature; [REDACTED]

21 [REDACTED]
 22 [REDACTED] Dr. Turk had no obligation to consider such
 23 irrelevant, non-scientific documents.³

24 _____
 25 ³ Indeed, in another decision in the *Rezulin* litigation, the court explained that what
 26 people or corporations meant by the words they wrote in "documents produced in
 27 discovery" has "no basis in any relevant body of knowledge or expertise," and therefore is
 28 *not* a proper subject of expert opinion. *In re Rezulin Prods. Liability Litig.*, 309 F. Supp.
 2d 531, 546-47 (S.D.N.Y. 2004); *see also Herrera v. Eli Lilly & Co.*, 2015 WL 12743696,
 at *8 (C.D. Cal. July 31, 2015); *JIPC Mgmt., Inc. v. Incredible Pizza Co.*, 2009 WL
 8591607, at *9 (C.D. Cal. July 14, 2009).

1 C. **Dr. Turk Properly Disclosed** [REDACTED]

2 Plaintiffs also argue that Dr. Turk’s entire testimony should be excluded under
3 Federal Rule of Civil Procedure 26(a)(2)(B)(ii) based on [REDACTED]

4 [REDACTED] Plaintiffs do not
5 (and cannot) assert that it was improper [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED] Instead, they complain that Dr. Turk’s notes and recollections of
9 those conversations are insufficient. That complaint is meritless and could not in any event
10 support exclusion of Dr. Turk’s testimony.

11 Rule 26(a)(2)(B)(ii) requires that an expert’s report contain “the facts or data
12 considered by the witness in forming them.” Dr. Turk disclosed [REDACTED]

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED] Plaintiffs
17 questioned Dr. Turk about those discussions at his deposition, and will have the
18 opportunity to cross-examine him at trial. Plaintiffs do not dispute any of these points.
19 Instead, they complain that Dr. Turk should have taken *more and better* notes and that he
20 should have been able to testify in more *detail* about his conversations. Mot. at 8-10. But
21 Rule 26 does not address an expert’s notes or testimony, much less dictate their contents; if
22 plaintiffs believe that either is deficient, that is a subject for cross-examination, not a basis
23 for exclusion. Cf. *Kaur v. City of Lodi*, 2016 WL 98752, at *2-3 (E.D. Cal. Jan. 8, 2016).

24
25 4 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 Plaintiffs' cited cases confirm that Dr. Turk's disclosures and production of his
 2 notes fully satisfy Rule 26(a)(2)(B)(ii). In *EMC Corporation v. Pure Storage Inc.*, 154 F.
 3 Supp. 3d 81 (D. Del. 2016) (cited at Pl. Mot. 10), the court rejected the argument that an
 4 expert "impermissibly relied on undisclosed and unexplained conversations," holding that
 5 he satisfied Rule 26 by citing in his report "both the identities of the persons [with whom
 6 he conversed] and the substance of the discussions." *Id.* at 116. That is exactly what Dr.
 7 Turk did: [REDACTED]

8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED] There is thus no basis for plaintiffs' hyperbolic assertion that they are "at a total
 12 loss" as [REDACTED]. Mot. at 9. Rather, this "common
 13 practice" of "cit[ing] to discussions with clearly identified knowledgeable persons . . .
 14 sufficiently disclosed the basis for [his] opinions." *EMC*, 154 F. Supp. 3d at 117.

15 Nor is plaintiffs' argument supported by *Freeny v. Murphy Oil Corp.*, 2015 U.S.
 16 Dist. LEXIS 118736 (E.D. Tex. June 4, 2015) (cited at Pl. Mot. 9-10), where the court
 17 struck portions of an expert report regarding conversations with a witness because the
 18 disclosing party had not disclosed the witness prior to the fact discovery deadline. *Id.* at
 19 *5-6.⁶ [REDACTED]
 20 [REDACTED]. Defendant
 21 Facebook, Inc.'s Supplemental Rule 26(a)(1) Disclosures (July 15, 2016) (Ex. 7).⁷

22 ⁵ [REDACTED]
 23 [REDACTED] Plaintiffs did not ask Dr. Turk about these topics at his deposition.

24 ⁶ Notably, a court in *this* circuit has *rejected* the argument that "a party must disclose
 25 under Rule 26(a)(1)(A)(i) . . . every person consulted by an expert witness prior to the
 26 disclosure of the expert's report." *Isola USA Corp. v. Taiwan Union Tech. Corp.*, 2015
 WL 1255874, at *2 (D. Ariz. Aug. 13, 2015).

27 ⁷ The only other case cited by plaintiffs is *Johnson v. Mead Johnson Co.*, 2012 U.S.
 28 Dist. LEXIS 195104 (D. Minn. Aug. 13, 2012), in which the District of Minnesota held
 that a disclosing party was required to produce emails between the party's expert and third-

1 Finally, even if Dr. Turk's disclosure of [REDACTED]

2 [REDACTED]
3 [REDACTED] not for excluding his testimony. Because Dr. Turk's analysis and opinions
4 are based on numerous *other* sources—which plaintiffs concede were adequately
5 disclosed—he would still be entitled to testify about those other bases for his opinions.

6 **D. Dr. Turk's Opinion About [REDACTED] Are**
7 **Based On Thorough And Fully-Disclosed Analysis.**

8 Plaintiffs next seek to exclude Dr. Turk's opinion that [REDACTED]
9 [REDACTED] under Federal Rule of Evidence
10 702 and Federal Rule of Civil Procedure 26, arguing that Dr. Turk provides inadequate
11 support for this opinion and fails to [REDACTED] Mot. at 10-12. These
12 arguments are squarely contradicted by Dr. Turk's report and deposition testimony.

13 Plaintiffs' claim that this opinion lacks sufficient "evidentiary or literary support"
14 and reasoning is based on yet another mischaracterization of Dr. Turk's report. Mot. at 10-
15 11. [REDACTED]

16 [REDACTED]. Plaintiffs attempt to dismiss this discussion
17 [REDACTED]
18 [REDACTED]. This argument is frivolous: as the report's citations show, [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED] *See, e.g.,*
22 *Iplearn, LLC v. Blackboard Inc.*, 2014 WL 4954462, at *2 (D. Del. Sept. 29, 2014)
23 (expert's review of source code and other materials, including technical documents and
24 deposition transcripts, was reliable method sufficient to satisfy Rule 702).
25

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27 parties, which potentially influenced the expert's opinion. That case is wholly inapposite:
28 Unlike the party in that case, Facebook has not refused to turn over any materials.

1 Plaintiffs' argument that Dr. Turk's analysis is unhelpful because he does not
 2 [REDACTED] is similarly meritless. Contrary to plaintiffs' assertions (Mot. at
 3 11), Dr. Turk *did* [REDACTED]
 4 [REDACTED]
 5 [REDACTED] This definition mirrors the one
 6 he gave in his report, where he explained that [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]. The basis for Dr. Turk's
 11 opinion will be abundantly clear to a trier of fact.

12 **II. DR. TURK IS QUALIFIED TO OPINE ON [REDACTED]**

13 [REDACTED].
 14 Plaintiffs seek to exclude Dr. Turk's opinion that [REDACTED]
 15 [REDACTED] because (1) he is not a computer
 16 security expert and (2) it is irrelevant. Mot. at 12. They are wrong on both counts.

17 Whether Dr. Turk is an expert in computer security is irrelevant: In addressing an
 18 opinion under Rule 702, the question is whether the expert has "appropriate qualifications .
 19 . . on that subject matter." *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000)
 20 (emphasis added). The subject matter of Dr. Turk's opinion is not [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]

24 [REDACTED]. That opinion is based on [REDACTED]
 25 [REDACTED]

26 8 [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED] Plaintiffs do not dispute that Dr. Turk is qualified to opine on that topic.

4 And his opinion is relevant to the key issue of whether Facebook's face signatures
5 and templates are "scans of face geometry." [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 [REDACTED] provides
11 further technological depth as to why Illinois's legislature would have chosen to regulate
12 only feature-based "scans of face geometry," and not holistic systems like Facebook's.

13 **III. DR. TURK'S OPINION THAT [REDACTED]**
14 **[REDACTED] IS SUPPORTED BY RELIABLE METHODS.**

15 Finally, plaintiffs reprise their groundless argument that Dr. Turk conducted no
16 analysis—this time in relation to his opinion [REDACTED]
17 [REDACTED]. Mot. at 13. Plaintiffs again fail to account for Dr.
18 Turk's 13 pages of analysis of [REDACTED]. Turk Rpt. 26-38. That analysis
19 showed [REDACTED]
20 [REDACTED]

21 [REDACTED] The relevance of this
22 analysis and opinion is clear: They show that plaintiffs' proposed interpretation of BIPA
23 as requiring Facebook to disable even the creation of face signatures without obtaining
24 prior notice and consent would make compliance with BIPA impossible.

25 **CONCLUSION**

26 Plaintiffs' motion to exclude the testimony of Dr. Matthew Turk should be denied.
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1 Dated: April 16, 2018

MAYER BROWN LLP

2 By: /s/ John Nadolenco

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4 Lauren R. Goldman

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